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Issue Date: 06 February 2004

CASE NO.: 2002-LHC-2443
OWCP NO.: 4-35177

In the Matter of:

AUGUSTINE MACK, JR.,
Claimant,

v.

CERES MARINE TERMINALS,
Employer,

and

REGIONAL RISK MANAGEMENT,
Carrier.

Appearances:

Bernard J. Sevel,. Esq.
For the Claimant.

Lawrence Postol, Esq.
For the Employer

Before: Stephen L. Purcell
Administrative Law Judge

DECISION AND ORDER

This proceeding arises from a claim under the Longshore and Harbor Workers' Compensation Act ("Act" or "LHWCA"), 33 U.S.C. § 901 *et seq*. Claimant is seeking an award of disability compensation for permanent partial disabilities of his left and right knees and left foot.

A formal hearing was held in this case on December 10, 2002 in Baltimore, Maryland at which both parties were afforded a full opportunity to present evidence and argument as provided by law and applicable regulation. Claimant offered exhibits 1 through 13 which were

admitted into evidence.[1] Employer offered exhibits 1 through 64 which were admitted into evidence. ALJX 1 through 3 were marked for identification and admitted into evidence without objection. At the close of the hearing, the parties requested the opportunity to pursue certain additional discovery and to present the testimony of their medical experts at a supplemental hearing. The request was granted, and a supplemental hearing was thereafter held in Baltimore on April 30, 2003. Employer offered additional exhibits 65 through 70 which were admitted into evidence. Both parties filed post-hearing briefs. The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

STIPULATIONS

The parties have stipulated (Tr. 5-8, ALJX 2 and 3) and I find:

1. That the parties are subject to the Act.
2. That Claimant and Employer were in an employee-employer relationship at all relevant times.
3. That Claimant sustained an injury arising out of and in the course of his employment on September 25, 2002.
4. That a timely notice of injury was given by Claimant to Employer.
5. That Claimant filed a timely claim for compensation.
6. That Employer filed a timely first report of injury and notice of controversion.
7. That there has been voluntary payment of compensation by Employer from December 11, 2000 to December 19, 2000 and January 3, 2001 to May 13, 2001 in the amount of $18,025.60. EX 1.
8. That Claimant reached maximum medical improvement ("MMI") on June 29, 2001.
9. That Claimant's average weekly wage at the time of the injury was $1,794.09.
10. That Employer is entitled to a credit of $6,742.70 for any award of compensation with respect to Claimant's left leg. CX 9, 10.

ISSUES

The only issue presented in this matter is the nature and extent of disability sustained by Claimant with respect to his right and left knees and left foot.

FINDINGS OF FACT

Claimant worked as a railhead checker for Employer at Ceres Terminal A at the Dundalk Marine Terminal, Dundalk, Maryland. Tr. 54. His duties as a railhead checker required Claimant to obtain a "load list" of containers which are supposed to be on the trains and then "run the track checking to see if the cargo is where it's supposed to be, if there's any damage that you can note that you can let CSX know about." Tr. 56. Claimant would also obtain a "chassis list from the railroad," copies of which were given to the drivers responsible for moving

[1] The following abbreviations will be used as citations to the record: "CX" for Claimant's Exhibits, "EX" for Employer's Exhibits, "ALJX" for Administrative Law Judge Exhibits, and "Tr." for Transcript.

containers from one location to another. *Ibid*. Claimant's job required that he leave his office, walk down some steps, enter a vehicle, drive out into the shipyard, and then return to his office. Tr. 57, CX 11.

Claimant created a log in May and June 2001 in which he recorded the number of round-trips made from his office into the shipyard over a thirty-one day period. Tr. 58-59, CX 12. A "[r]ound-trip involves getting out of your car, going up the steps into the office, picking your papers up, coming out of the office, getting into your car, driving around . . . and you're locating whatever cargo you have to locate, and after you find the location it's back in the office transferring the locations onto the load sheets." Tr. 59. During the period he maintained records, the greatest number of round-trips recorded was 32 and the least number of round-trips recorded was 14. Tr. 60.

It had been raining on September 25, 2000, the day Claimant was injured. Tr. 61. He got out of his car and was running up the steps to the office when he slipped and fell hitting both knees on the edge of one step and his left leg on a lower step. *Ibid*. He reported the injury to his supervisor but kept working until that afternoon when he sought medical attention. *Ibid*. Don Cook, the superintendent, took Claimant to Bayview Medical Center where he was treated. *Ibid*.

A Form LS-202, Employer's First Report of Injury or Occupational Illness, reflects that Claimant sustained injuries on September 25, 2000 at 7:25 am to his left knee and left foot, and medical treatment by Dr. Douglas Shepard was authorized by Employer. EX 4.

Claimant was examined on September 25, 2000 by Dr. Anita M. Holloway. Ex 15. The report of that examination notes chief complaints of right knee and left foot pain. The assessment was right knee contusion and left foot contusion with ecchymoses noted on the dorsum of the foot. *Ibid*. Dr. Holloway authorized Claimant's return to full duty on September 28, 2000. EX 17.

Claimant was seen by Dr. Holloway again on October 2, 2002 for re-evaluation. EX 16. Claimant was experiencing persistent symptoms, and an x-ray of the left foot was ordered. *Ibid*.

Claimant was seen on October 5, 2000 by Dr. Goala for follow-up for left foot and right knee discomfort secondary to his fall on September 25, 2000. EX 18. The diagnosis recorded in the report of examination was contusion of the left foot, resolving, and fracture of the left fourth toe, self-healing. *Ibid*. Claimant was authorized to return to work and told to tape his third and fourth toes together for two to three weeks with a cotton swab in between for comfort. *Ibid*.

The report of an orthopedic consultation by Dr. Shepard on October 26, 2000 reflects impressions of: contusion of the right knee with resultant infrapatellar tendonitis and bursitis of the tibial tubercle; internal derangement of the left knee (rule out lateral meniscus tear); contusion of left foot with healing fracture of the 4th toe; and possible occult sprain or intra-articular fracture of the cuboid-cuneiform. EX 20 at 4. Physical examination revealed, *inter alia*: ambulation with a mild limp and antalgia favoring the right leg; inability to toe-walk due to left forefoot pain but ability to heel-walk; no effusion or asymmetry in circumferential measurements of the knees; right and left knee range of motion of zero to 120 degrees;

tenderness over the lateral joint line of the left knee and exacerbation of lateral pain with Apley's and McMurray's tests negative; anterior Drawer and Lachman's tests with medial and lateral collateral ligaments stable and painless to valgus and varus stress testing; no crepitus; tenderness and minimal edema over the right tibial tubercle in the distal centimeter of the patellar tendon which appeared to be intact to palpation; full mobility of left toes and ankle with tibial talar and subtalar joints stable and non-tender to stress testing and no effusion or crepitus; and pain and edema superficial to calcaneal cuboid articulation which was "less so over the 5th metatarsal cuneiform joints." *Id*. at 3. An October 2, 2000 x-ray of the left foot revealed a well-aligned healing 4th toe proximal phalangeal fracture and mild intertarsal arthritis of the talonavicular articulation. *Id*. at 4. Dr. Shepard recommended MRI's of the left foot and knee and x-rays of the bilateral knees. *Ibid*. Dr. Shepard also recommended a stabilizing right knee brace, physical therapy, and work limitations requiring Claimant to avoid repetitive stooping, kneeling, and climbing. *Id*. at 5.

An MRI of the left knee done November 10, 2000 revealed a complex tear of the posterior horn of the lateral meniscus extending to the superior articular surface and small joint effusion with a tiny Baker's cyst. EX 24. An MRI of the right knee that same date revealed possible mild degenerative changes, inflammatory changes at the tibial tuberosity, and no fracture or subluxation. EX 25.

Dr. Shepard did a follow-up orthopedic examination of Claimant on November 21, 2000. CX 1 at 6-8, EX 26. The report of his examination notes that Claimant was continuing to work on a full time basis and reported substantial improvement in his right knee symptoms with the brace he prescribed. Claimant reported recurrent, though milder, swelling and pain of the left foot which was increased after repetitively climbing and descending steps. Claimant also stated that left knee pain and swelling persisted and his knee had given way twice after descending stairs at work. Examination revealed Claimant was able to ambulate well without significant limp or antalgia, full mobility of the right knee with no instability, and minimal crepitus and discomfort. The left knee remained "quite tender over the lateral joint line with a positive McMurray's and Apley's test, and moderate effusion persists." *Id*. at 1. Tenderness over the base of the left 4th toe with mild subtalar effusion was also noted, along with normal left forefoot and ankle mobility and stability. *Id*. at 2. Dr. Shepard noted, with respect to his assessment and plan for Claimant: post-traumatic right knee infrapatellar tendonitis, improving; left knee posterior horn lateral meniscus tear with arthroscopy recommended in light of persistent effusion and mechanical giving-way symptoms; and a contusion of the left forefoot and sprain of the left subtalar joint, with Cortisone and Marcaine injections if symptoms persisted. *Ibid*. Further physical therapy was not recommended, and Claimant was authorized to continue working in his then-present capacity. *Id*. at 3.

Claimant was examined on December 11, 2000 by Dr. Jack L. Wapner. EX 27. The report of examination notes that Claimant had an MRI of the left knee on November 10, 2000 which revealed a complex tear of the posterior horn of the lateral meniscus, extending to the superior articular surface. Dr. Wapner's examination confirmed a lateral meniscal tear resulting from his September 25, 2000 injury with symptoms increasing. He believed Claimant was at risk for his knee giving out and failing, causing further injury. He recommended arthroscopic

surgery of the left knee as soon as possible and that Claimant remain off work for safety reasons until that time. *Id*. at 2.

In an undated letter to Edward Fox, RN, Dr. Shepard states that Claimant was scheduled for arthroscopic surgery December 20, 2000 but elected to wait until after the beginning of the new year to undergo surgery. EX 29. Dr. Shepard further states that Claimant is medically able to return to work until his surgery, scheduled for January 3, 2001, if he avoids repetitive stooping, kneeling, stair climbing, and standing. *Ibid*.

On January 3, 2001, Dr. Shepard performed a left knee diagnostic and operative arthroscopic procedure on Claimant at Mercy Medical Center. CX 3. A report of the procedure notes post-operative diagnoses of: post-traumatic radial and cleavage tear, posterior horn lateral meniscus tear; and post-traumatic grade 3 chondromalacia defect of the weight bearing articular surface medial femoral condyle left knee. *Ibid*.

Claimant was seen for post-surgery follow-up with Dr. Shepard on January 10, 2001. CX 1 at 9-11. He was ambulating with support of a crutch and had a limp and antalgic gait favoring the right leg. CX 1 at 9. Moderate left knee effusion was noted. *Ibid*. Minimal tenderness was also noted, and the knee was stable to stress testing. Mobility of the left ankle and forefoot was full, with some pain noted in the left calf. CX 1 at 10.

Similar findings were reflected in follow-up reports by Dr. Shepard dated January 12, 19, 25, and 31, 2001 with ongoing complaints of left calf pain. CX 1 at 12-20.

A follow-up report dated February 15, 2001 notes that Dr. Shepard believed Claimant would be able to resume working by April 1, 2001. CX 1 at 22.

Claimant reported, *inter alia*, retropatellar pain in his right knee when seen by Dr. Shepard on March 8, 2001 and an MRI of the knee was ordered. CX 1 at 23-24.

An April 6, 2001 MRI of Claimant's right knee revealed tears of the anterior and posterior horns of the lateral meniscus and a "[s]mall multilobulated cyst in the anterior aspect of the intercondylar notch which may represent a meniscal cyst associated with the lateral meniscal tear or a ganglion cyst." CX 4 at 47.

On April 18, 2001, Mark E. Dennis, M.Ed., a Vocational Case Manager, signed a "Job Analysis Report With Video" in which he described the duties of a "Checker/Clerk" at Ceres Marine Terminal. EX 47. The report noted, *inter alia*, the checker spent approximately 90% of his time sitting, either in a pick-up truck or office chair, 5% of his time standing, and 5% of his time walking. *Ibid*. The report further noted that a checker made, on average, three to four round-trips per eight-hour shift. *Ibid*., *see also* EX 60 (videotape).

On April 20, 2001, Dennis signed the same job analysis report which was reviewed and signed by Dr. Shepard on May 9, 2001. EX 48.

A May 3, 2001 follow-up report by Dr. Shepard notes that an MRI of the right knee revealed a lateral meniscal cyst due to lateral meniscal tear CX 1 at 27. Impressions noted at that time were: satisfactory postoperative result following left knee arthroscopy for lateral meniscus tear; posttraumatic right knee lateral meniscus tear without effusion or instability; and chronic lumbalgia with subjective symptoms consistent with right sciatica without focal lower extremity neurological deficit. CX 1 at 28. Dr. Shepard opined that Claimant could return to work as a "checker" on May 14, 2001. CX 1 at 29.

Claimant testified that he returned to work after his knee surgery on May 14, 2001 based on Dr. Shepard's determination that he could perform his duties as a railhead clerk as those duties were portrayed in a videotape prepared by Mark Dennis. Tr. 70-72. Claimant did not believe that the videotape accurately portrayed his work-related activities. *Ibid*.

On May 16, 2001, Claimant was seen for an Independent Medical Examination ("IME") by Dr. Robert Riederman. EX 45. The report of examination notes, with respect to the left knee: mild effusion; quadricep atrophy of ½ cm; no spasm; tenderness about the patellofemoral joint and lateral joint line; range of motion of zero to 125 degrees; intact cruciate and collateral ligaments; and negative McMurrary test. *Id*. at 2-3. There was also tenderness about the posterior aspect of the left calf and mild edema about the lower leg. *Id*. at 3. Examination of the right knee showed: slight effusion; no spasm; no atrophy; tenderness to palpation about the patellofemoral joint and lateral joint line; mild tenderness to palpation along the medial joint line; range of motion of zero to 125 degrees; intact cruciate and collateral ligaments; and a negative McMurray test. *Ibid*. Dr. Riederman stated that Claimant's subjective symptoms regarding his right knee seemed excessive in light of the objective findings, and opined that his right knee symptoms were partially related to his September 25, 2000 injury and partially related to preexisting degenerative disease. *Id*. at 4. Based on his review of available data, including a video job analysis, he believed Claimant could perform his regular duties as a checker. *Ibid*. He further stated that right knee surgery with a partial meniscectomy would be indicated if Claimant's right knee symptoms continued. *Ibid*. With respect to the left knee, he stated that x-rays revealed no findings of degenerative disease, but also stated that "objective findings of a meniscal tear and degenerative disease are supported by the data in the medial [sic] record as well as the radiographic findings." *Ibid*. According to Dr. Riederman:

> It would be expected that a patient would derive benefit from undergoing arthroscopic left knee surgery with partial meniscectomy for treatment of a meniscal tear. I believe that the ongoing symptoms in the left knee would be related to degenerative disease which predated the injury of September 25, 2000. This patient's current subjective symptoms regarding the left knee seem excessive in view of the objective findings.

Ibid. He also stated that Claimant had derived maximum benefit from the arthroscopic left knee surgery and physical therapy, and had reached MMI following that treatment. *Ibid*.

The next follow-up report by Dr. Shepard dated May 21, 2001 states, in part:

> Mr. Mack resumed working on May 14, 2001. I personally reviewed the patient's job description as a "checker" as supplied by the nurse case manager, Edward Fox. The written job description was supplemented by a reference video job analysis. The patient's physical activities and the course of his work as a checker included occasional climbing four to five stairs to an office trailer, and occasional standing, frequent sitting, and working with hands at waist level. Sitting encompassed nearly ninety (90%) percent of his work time. It is noted that the patient's job entailed walking down four steps and entering a pick-up truck, driving the truck to a designated cargo container, transporting the truck back to the office area at the terminal, climbing out of the truck, and walking back into the office. This process was repeated on the average of three to four times per eight hour shift. Four hours a day were confined to conducting office duties such as answering the telephone and completing forms. The patient has maintained a log of his work tasks from May 14, to May 21, 2001. Except for the May 16, 2001 orthopedic IME with Dr. Robert Riederman, the patient has recorded repetitive climbing of five to eight steps into the office ranging from thirty-seven "round trips" escalating and descending the steps on May 14, 2001 to thirty-eight round trips up and down the steps on May 20, 2001. Today, he performed twenty-three "round trips" up and down the steps and these figures also reflect the number of times the patient was required to get in and out of the pick-up truck.

CX 1 at 30. Claimant reported, *inter alia*, that his return to work was "killing his knees." CX 1 at 31. Physical examination revealed minimal patellofemoral crepitus and slight tenderness to palpation of the knees bilaterally and essentially full range of motion. *Ibid*. The impressions recorded in the report included right knee lateral meniscus tear and post-operative left knee arthroscopy for work-related internal derangement. CX 1 at 32. Dr. Shepard opined that climbing and descending five to eight steps repetitively on at least nineteen round trips per eight hour shift would aggravate Claimant's lumbar and knee conditions and was not consistent with the job analysis for checker upon which he had released him to work. *Ibid*.

Claimant changed jobs in June 2001 from being a "railhead checker" to "clerk/checker." Tr. 75-76. When asked by his attorney if there was any connection between the condition of his knees and his decision to change jobs, Claimant testified:

> Well, the, the fact that I was running up and down the steps, jumping in and out of the car, walking around, looking for this, looking for that, and it just had gotten to a point where it was really beating me up pretty bad so I decided that I would just – you know, I called the union hall. I told them that I was leaving, asked them to put me on the books, and that was it.

Tr. 77. With respect to his new job, Claimant testified:

> I'm still working at a longshore level 953 as a checker, but now – I'll get a job – containers, container loading and discharging and I'll sit in a car, and all I do is with a hand-held computer. Then there's days that I might be on the front door, and I'll walk in and out of the office, and yes, I do, have to spend some time on

> my feet because there's no job around there that you don't have to spend time on your feet. There is row-row ships, and when you have a row-row ship, Your Honor, which is a roll on, roll off ship, it has a big ramp in the back, some of them have containers. When they have containers, usually the ship – will put me on containers and then again I could work – it's either with a pencil checking numbers off as they're loaded and in the position that they're being loaded to, or with a hand-held computer where you're punching, you're punching the numbers in.

Tr. 78. According to Claimant, he was making "a lot less" money in that position than as a railhead checker. Tr. 78-79.

On June 29, 2001, Dr. Shepard again examined Claimant. CX 1 at 33. He noted that Claimant reported his "left knee gave way one week ago while descending steps at work, although he was released to a check-clerk job following his last examination." *Ibid*. The report further notes that "patient's current job description denotes that the patient is responsible for walking 22 times down the steps, 22 times up a trailer and office steps, climbing in and out of a vehicle 22 times in an 8-hour shift." *Ibid*. With respect to his physical examination of Claimant, he noted that he ambulated without limp or antalgia, he had full mobility of the knees without effusion, and he had mild patellofemoral crepitus bilaterally. *Ibid*. He also noted that lower extremity motor strength revealed no weakness, various tests performed were negative bilaterally, and both knees displayed stable ligamentous stress test results. *Ibid*. Dr. Shepard determined that the Claimant had reached MMI with respect to his left knee arthroscopy, and had an internal derangement of the right knee. *Ibid*. He found no contraindication to Claimant working as a checker-clerk provided he limited his stooping, climbing, lifting, and getting in and out of cars.

A July 6, 2001 letter to Edward Fox from Dr. Riederman states that he has reviewed a videotape which demonstrates the job duties and requirements of Claimant's position as a checker at Ceres Marine Terminal, and a job analysis report completed on June 28, 2001. EX 46. Dr. Riederman also reviewed Claimant's medical record, including a report of evaluation performed May 16, 2001, and opined that Claimant would be able to work full time as a checker without restrictions. *Ibid*.

An October 4, 2001 addendum to Dr. Shepard's June 29, 2001 report notes:

> In my opinion, utilized in the 4th edition to the AMA Guide of Permanent and Partial Impairment and taking into account subjective findings such as pain, weakness, loss of endurance, capacity to carry out activities of daily living, work and recreational activities in a facility without discomfort which Mr. Mack enjoyed prior to his 9/25/00 work-related accident that he has sustained a 40% impairment to the left knee, 25% impairment to the right knee and 20% impairment to his left foot."

CX 1 at 34. No further explanation for the ratings is provided.

The report of a November 16, 2001 follow-up orthopedic evaluation by Dr. Shepard notes Claimant's chief complaint was "right proximolateral thigh, buttock, hip and lumbar pain exacerbated when he crosses the right leg over the left or with arising after prolonged sitting or recumbency, hip flexion, lying in the right lateral decubitus position, rolling over in bed and inclement weather." CX 1 at 36. No findings are noted with respect to Claimants knees or left foot.

On January 18, 2002, Dr. Andrew Pollak reviewed the available medical evidence and performed an IME of Claimant. EX 52. Physical examination revealed, *inter alia*: normal gait and stance on walking; difficulty toe-walking; some difficulty heel-walking; mild effusion bilaterally of the knees; range of motion from approximately 3 degrees to 140 degrees bilaterally; positive patellofemoral grind test of right and left knees with lateral joint line tenderness on palpation, more on the right than left; and no instability of either knee. *Id*. at 3. There was also full range of motion bilaterally of the ankles without pain with 1+ pitting edema of the lower extremities to the mid calf level. *Ibid*. Based on his review of the evidence, and examination of Claimant, Dr. Pollak concluded, *inter alia*, that: Claimant's left foot was "relatively asymptomatic with no objective findings to suggest symptoms should be present or would develop in the future;" he had patellofemoral chondromalacia and chondromalacia of the medial femoral condyle in the left knee with mild effusion and positive patellofemoral grind test; he had patellofemoral pain syndrome with tears, chronic, of the anterior and posterior horns of the lateral meniscus in the right knee with a positive patellofemoral grind test, mild effusion, and lateral joint line tenderness; Claimant's left foot, left knee, and right knee conditions resulted from the injuries he sustained on September 25, 2000 at work; Claimant could continue to work full time in his regular job as a checker, as that position was portrayed in the video job analysis; and he suffered from other medical conditions, including right hip bursitis and chronic lumbalgia, which were unrelated to his September 25, 2000 accident. *Id*. at 8-9. Based on his examination, and a review of the Fourth Edition of the American Medical Association Guides to the Evaluation of Permanent Impairment ("AMA Guides"), Dr. Pollak provided an impairment rating of 6% for the left knee. *Id*. at 9. In support of this rating, he explained:

> Since the surgical procedure performed on the left knee was a subtotal lateral meniscectomy, the whole person impairment is 2% and the lower extremity impairment rating is 6% (*Guides*, chapter 3, page 85, table 64). According to the *Guides*, impairment secondary to knee arthritis is based on roentgenographically determined cartilage intervals and not arthroscopic findings of chondromalacia or non-radiographic objective findings consistent with chondromalacia. Because there is no decrease in the claimant's cartilage interval based on radiographs obtained by me on January 18, 2002, no additional impairment is assigned based on radiographic evidence of arthritis.

Ibid.

X-rays of Claimants bilateral knees taken on January 18, 2002 revealed: on right side, no significant degenerative changes; no effusion; very slight degenerative changes at the patellofemoral joint, and slight irregularity of the anterior tibial tubercle; on the left side, well

preserved joint spaces with no significant degenerative changes; very slight early osteoarthritic changes at the patellofemoral joint; and no effusion. EX 50.

On September 20, 2002, Dr. Pollak conducted an updated IME of Claimant and reviewed additional medical records. EX 54. His physical examination of Claimant revealed, *inter alia*: mild effusion of the left knee with lateral joint line tenderness, mild patellofemoral crepitus, range of motion zero to 130 degrees, and no instability; no effusion or joint line tenderness of the right knee with range of motion of zero to 140 degrees; and "absolutely no difference [in the left foot] compared to the right foot." *Id*. at 4. Dr. Pollak continued to opine that Claimant was capable of performing the tasks of railhead checker on a day-to-day basis without restrictions. *Id*. at 6. Using the Fifth Edition of the AMA Guides, he opined that Claimant's left knee warranted a 6% impairment rating based on his prior subtotal posterior horn lateral meniscectomy. *Id*. at 8. He further opined that Claimant had no impairment of either his right knee or left foot. *Ibid*. With respect to his assessment of Claimant's level of impairment, Dr. Pollock wrote:

> Of note is . . . the fact that I have not included any assessment of pain other than that, which would be expected for the conditions addressed in the guides. I have done this intentionally because it is my belief that most of the pain that causes the claimant to lose sleep at night and causes limitation in his activity is related to his right hip. Radiographically, his right hip arthritis is advanced and clearly predates his injury of September 25, 2000. It is my belief, beyond a reasonable degree of medical certainty, that assignment of impairment secondary to right hip arthritis resulting from the work related incident of September 25, 2000 would be inappropriate.

Ibid.

A report of follow-up evaluation by Dr. Shepard dated November 22, 2002, notes that he has reviewed a final impairment rating of Claimant's orthopedic injuries dictated by Dr. Pollak on September 25, 2002. CX 1 at 38. Physical examination revealed, *inter alia*, that: Claimant was ambulating with an antalgic limping gait pattern favoring his right leg; range of motion of the right and left knees was zero to 120 degrees; there was some tenderness and mild patellofemoral crepitus; and Claimant had good strength and muscle tone. *Ibid*. Dr. Shepard also noted a 1.5 cm increased girth in circumferential measurements of the left foot, tenderness without crepitation over the dorsal, mid, and lateral tarsus, and an inability to toe-walk due to foot pain. Dr. Shepard reiterated his earlier ratings of 40% for the left knee, 20% for the right knee, and 20% for the left foot. *Ibid*.

On December 7, 2002, Dr. Pollak wrote to Employer's attorney after having reviewed the updated job analysis report and video dated June 28, 2001 detailing the demands of Claimant's job as a railhead checker which included the need to ascend and descend short flights of stairs and enter and exit vehicles up to 30 times per day. EX 64. Dr. Pollok wrote:

> I found the video completely consistent with my evaluation of September 20, 2002. It is my opinion based on my evaluation of the claimant on September

20 and my review of the video that he is capable of performing the job of railhead checker at this time.

Ibid. He also reviewed Dr. Shepard's report dated November 22, 2002 discussing the concerns Dr. Pollak raised about Dr. Shepard's previous impairment rating. Dr. Pollak wrote that Dr. Shepard's report did not change his assessment of Claimant's impairment or his assessment of whether he was capable of working as a railhead checker. *Id*. at 2.

On January 15, 2003, Dr. Pollak did another follow-up IME of Claimant based on discrepancies between his evaluation of Claimant's left foot and that of Dr. Shepard. EX 65. According to Dr. Pollak, when Claimant was examined by him on September 20, 2002, he stated that his broken toe had healed itself and that it did not bother him. *Id*. at 1. When Dr. Shepard subsequently examined Claimant, he noted a 1.5 cm increase in girth in the left foot and wrote that Claimant was experiencing left foot pain and swelling that increased with prolonged ambulation, inclement weather and climbing steps. According to Dr. Pollak, Claimant acknowledged having made the statements noted in the report of the September 20, 2002 IME but now said that those statements did not accurately reflect the feelings he was having in his foot. *Id*. at 2. Dr. Pollak's physical examination of January 15, 2003 revealed, *inter alia*, a 1.5 cm increased girth in the left foot compared to the right; a nearly symmetric gait but with difficulty with the stairs when exiting the building, tenderness to palpation over the medial aspect of the mid-foot extending toward the lateral aspect of the ankle over the extensor digitorum brevis muscle, and tenderness over the anterior joint line of the ankle anterolaterally. *Ibid*. Based on his examination and review of the medical records, Dr. Pollak concluded that there was evidence of mild mid-foot arthritis and mild hind-foot arthritis, neither of which were more likely than not caused or permanently aggravated by Claimant's prior work-related injuries. He also opined that there was nothing in either the Fourth or Fifth Edition of the AMA Guides which would justify any impairment rating with respect to the left foot. *Id*. at 3.

At the formal hearing held in this case on December 10, 2002, Claimant testified about, *inter alia*, the injuries he sustained on September 25, 2000, the nature of his duties as a railhead checker (including the number and frequency of his "round trips" from the office to the shipyard), and the nature and extent of his physical limitations which he attributed to his work injuries. Tr. 54-128.

Joseph Butta, a co-worker testified on behalf of Claimant that: he sometimes worked as a checker at Ceres between 1990 and June 2000; he primarily worked the night shift but also worked the day shift with Claimant; and that the number of "round trips" a checker made during the day shift would range from approximately 24 to 36. Tr. 130-35. He acknowledged that the terminal appeared less busy at the time of the hearing than it did when he stopped working in June 2000, testified that he only worked sporadically on day shifts during his last full year, and stated that an average trip out to the shipyard and back to the office took approximately 20 to 25 minutes. Tr. 135-39.

John Cook testified on behalf of Employer that he was a Manager at Ceres Marine Terminals, he was familiar with the duties of the job Claimant performed, he worked out of the same trailer-office in which Claimant worked, and the average number of trips Claimant made

out to the yard and back was approximately 12. Tr. 141-43. He further testified that each trip took approximately 20 to 30 minutes, the normal number of hours in a shift was eight, and he (Cook) was in his office about half the time. Tr. 143-47. He also stated that Claimant was in the office about 3 out of 8 hours. Tr. 151-52.

At the supplemental hearing held on April 30, 2003, Mark Dennis testified on behalf of Claimant about the facts and circumstances surrounding his preparation of the two job analysis reports and videotapes done in April and June 2001 concerning Claimant's job as a railhead checker. Tr. 165-203, CX 11, EX 47, 60-61. He arrived at the work site around 8:00 am on April 18, 2001 to film the first videotape, and recorded the activities of Frank Acton performing the railhead checker's job over about a three-hour period. Dennis estimated, based on watching Acton, that a checker made approximately three to four round trips per eight hour shift. After Claimant disputed the accuracy of the April 18th videotape, Dennis returned to the job site at approximately 7:00 am on June 28, 2001 and stayed through most of the shift videotaping Claimant performing his duties as a checker. He calculated that on a slow day, checkers made approximately 10 rounds trips, on a busy day about 30 round trips, and on an average day about 20 round trips. The only basis he had for determining whether June 28th was a busy or slow day was his observations on that day and April 18th and his conversations with Claimant about how that day compared with other work days. He was not focusing on the number of trips that Acton made on April 18th and believes that he made three to four round trips during the three-hour period he observed Acton performing the job of checker. Each trip out and back took approximately 20 to 30 minutes, there was typically a break of from 5 to 10 minutes after returning to the trailer, and the time of a round trip would vary depending on the number of containers on Claimant's list.

Dr. Shepard testified at the April 30, 2002 hearing about his treatment of Claimant and his opinions regarding the ratings of Claimant's disabilities resulting from his September 25, 2000 injuries. Tr. 203-302. He is board-certified in orthopedic surgery and has been in private practice in that field since 1984. CX 2.

He first began treating Claimant in October 26, 2000, was unaware of the fact that he had previously been awarded disability ratings totaling 9 ¾ percent for the left knee stemming from an earlier injury, and, without reviewing MRI's or x-ray findings and related medical records relating to he earlier injuries, could only speculate about whether his assessment of Claimant's condition now would change. *See* CX 9, 10.

Dr. Shepard distinguishes between "impairment" and "disability" in that the former "doesn't account for pain, weakness, his ability to carry out activities of daily living, his job, and disability, the way I understand, it applies to a specific job." Tr. 225. The AMA Guides, in Dr. Shepard's opinion, do not adequately account for pain in the rating of disabilities despite the fact that pain in and of itself can be a disabling factor. Tr. 235-36.

The Fourth Edition of the AMA Guides would allow a rating of 1% for the whole-person or 2% for the lower extremity with respect to a knee condition involving a partial meniscectomy. Tr. 239, EX 67 at 3/85. According to Dr. Shepard, "if you just use the Guide, you give him two percent." Tr. 240. Not accounted for in the AMA Guides, in Dr. Shepard's opinion, is that

Claimant had a grade 3 medial femoral chondral defect, which was aggravated by his September 25, 2000 injury, "which is going to doom this man down the road in some form or fashion, [for which] you've got to give him credit." Tr. 242. Dr. Shepard would add eight percent to the rating of the left knee disability due to chondromalacia giving Claimant a combined 10% rating. Tr. 247. If Claimant had a desk job instead of working as a railhead checker, Dr. Shepard would "probably" give him a 25% rating for the left knee. Tr. 249. The additional 15% added to the 25% rating is because Claimant works as a railhead checker. Tr. 249-50. If Claimant's left knee were rated according to the Fifth Edition of the AMA Guides he would be awarded a 5% rating. Tr. 256. Dr. Shepard's assessment of Claimant does not reflect the range of pain indicated by the Visual Analog Scale, which is a linear scale used to grade pain from 1 through 10 depending on severity. Tr. 259, EX 68 at 15/310.

Use of the AMA Guides would result in a zero disability rating for Claimant's right knee. Tr. 261. Dr. Shepard's initial 25% and subsequent 20% ratings of Claimant's right knee are based on his symptoms, an MRI finding of a lateral meniscus tear which did not warrant surgery, and examination findings. Tr. 262.

Use of the AMA Guides for Claimant's left foot would result in a 14% rating based on "fairly significant narrowing" of the joint space shown on x-ray. Tr. 263. Dr. Shepard did not document the amount of separation in the joint shown on x-ray but it was "substantial," approximately "a millimeter." Tr. 264. He came up with a 20% rating for the left foot based on "all the other factors." Tr. 265. If the separation in the joint in the left foot was two millimeters, the rating would be zero under the AMA Guides. Tr. 266. Prior to assigning a 20% rating for Claimant's left foot on October 4, 2001, it was "normal" when examined on May 3, 2001, showed signs of "swelling" on May 31, 2001, and was asymptomatic on June 29, 2001. Tr. 274-78.

Claimant would be able to perform his job as a railhead checker if it took approximately 20 to 30 minutes to locate containers on each trip to the yard and he waited between 5 and 10 minutes in the office before the next trip. Tr. 279.

After Dr. Shepard had concluded in October that Claimant's left foot impairment should be rated at 20%, he again examined Claimant on November 22, 2002 and determined that he had reduced range of motion in the left ankle. Tr. 289-94, CX 1 at 38A-B. Using the Fourth Edition of the AMA Guides, Claimant would be entitled to a 22% rating for the left foot based on reduced range of motion and x-ray findings. Tr. 297.

Dr. Pollak also testified at the April 30, 2003 supplemental hearing with respect to his evaluation and rating of Claimant's bilateral knee and left foot disabilities. Tr. 304-66. He is board-certified in orthopedic surgery and is an Associate Professor of Orthopedics at the University of Maryland School of Medicine where he teaches research and clinical patient care responsibilities on a full-time basis. Tr. 305-06.

According to Dr. Pollak, the manner in which Dr. Shepard utilized the AMA Guides in determining a rating for Claimant's left foot based on range of motion was incorrect. Tr. 308.

The AMA Guides do not base ratings on the difference in range of motion between the left and right foot. Tr. 310.

Dr. Pollak found no problems with the range of motion in Claimant's left foot during his examinations. Tr. 314. When examined on January 18, 2002, Claimant did not offer any subjective complaints with respect to his left foot, and the examination of the foot was "normal." Tr. 318-19. Examination of the left knee at that time showed "evidence of ongoing patella femoral chondromalacia and chondromalacia of the medial femoral chondral as Dr. Shepard noted on his examination" which was related to the September 25, 2000 accident. Tr. 319. The right knee diagnosis "was patella femoral pain syndrome with tears – with chronic tears of the interior and posterior horns of the lateral meniscus" which Dr. Pollak assumed were related to the September 25, 2000 accident. *Ibid*.

Relying on the Fourth Edition of the AMA Guides, Dr. Pollak assigned a 6% rating for the left knee based on Claimant's subtotal meniscectomy which he believed was more analogous to the rating for a "total" meniscectomy (7%) than a "partial" meniscectomy (2%). Tr. 322. Under the AMA Guides, "[t]he addition of a rating for pain is appropriate when the pain that is present is above and beyond that which would be normally expected following the condition that is listed on table – in Table 64. In other words, the diagnostic related criteria are intended to include the portion of pain that's normally associated with that condition, and a subtotal lateral meniscectomy is not something that results in a symptomatic knee." Tr. 322-23. The Fifth Edition of the AMA Guides puts a 3% cap on any additional rating for pain. Tr. 323. It is a guide to the evaluation of "impairment," which relates to the lack of function in a particular joint or area of the body, whereas "disability" relates to the inability to perform a particular function. *Ibid*. "A very minimal impairment could lead to a substantial disability." Tr. 324.

With regard to the right knee, Claimant's torn meniscus did not warrant anything other than a zero percent rating since there had been no meniscectomy and the meniscus, although torn, remained in place and served its function as a cushion between the femur and tibia. Tr. 327. Neither were there other manifestations of impairment, such as altered gait or arthritic findings, which would warrant assignment of an impairment rating. Tr. 327-28.

When examined on September 20, 2002, Claimant had no impairment in the range of motion of his left ankle. Tr. 328. His report of examination reflects that Claimant told him his left foot did not bother him and his broken toe had healed itself. Tr. 329.

According to Dr. Pollak, Claimant's difficulty in going up and down stairs is a result of his hip arthritis. Tr. 330.

Dr. Pollak examined Claimant again on January 15, 2003 and found no limitation in the range of motion of his left ankle or toes, but confirmed an increase of 1.5 cm in the girth of his left foot due to swelling. Tr. 331-32. The AMA Guides would allow assignment of a 10% rating if dorsiflexion of the ankle was from zero to 10 degrees as shown in Dr. Shepard's examination. Tr. 332. In Dr. Pollak's opinion, the swelling in the left foot was not attributable to his September 25, 2000 injury since the injury consisted of a toe fracture and a strain which would result in no permanent disability. Tr. 333-34.

Dr. Pollak does not agree with Dr. Shepard's 40% rating of the left knee because there is no loss of joint space in the knee, there is full range of motion, and Claimant has undergone a lateral meniscectomy. Tr. 335-36. With regard to Claimant's right knee, none of the criteria outlined in the AMA Guides which would justify an impairment rating are actually present. Tr. 336. The problems Claimant is experiencing with respect to his right leg are attributable to his hip condition. Tr. 337. With respect to the left foot, Dr. Shepard incorrectly testified about narrowing of the tarsal metatarsal joints when his reports actually relate to the talon abicular joint. Tr. 337-38. The x-ray evidence with respect to Claimant's talon abicular joint would not justify an impairment rating under the AMA Guides. Tr. 338. The strain injury to Claimant's left foot is the type of injury which would manifest itself immediately and thereafter resolve without any aggravation of the pre-existing arthritic condition in the foot. Tr. 342. Post-traumatic arthritis typically results from injuries to joints with displacement in the joint, and Claimant's toe fracture did not occur in the area of the foot where Claimant's arthritic condition exists. *Ibid*.

Dr. Pollak considered factors other than the meniscectomy of the left knee in rating impairment, including the chondromalacia of Claimant's left knee. Tr. 349. Chondromalacia is a component of arthritis, and Claimant's condition did not meet the severity necessary to assign a rating. *Ibid*. Likewise, the severity of Claimant's right knee condition did not warrant assignment of an impairment rating. Tr. 351. Dr. Pollak agrees that pain may impair an individual's ability to use a limb, and that pain is "very subjective." Tr. 352-53. In his opinion, Claimant's complaints of pain were real. Tr. 353.

Frank Acton testified at the April 30, 2003 supplemental hearing that he works for Employer as a clerk at the railhead, and that he makes approximately six to eight round trips in performing that job between 7:00 am and 3:00 pm. Tr. 367-69. The level of work has "somewhat decreased" since Claimant worked at Ceres Marine Terminal. Tr. 369. There is no "average" time it takes to leave the office and locate containers, and it could take as little as 5 or 10 minutes. *Ibid*. It might take between 20 and 30 minutes depending on how many containers appear on the list. Tr. 370. It would be a waste of everyone's time if clerks routinely went out to locate two containers at a time. Tr. 372-73. At the time of the hearing, Acton had been performing the job of railhead clerk for three years and four months, and, when he first started, worked the same shift with Claimant. Tr. 373. The number of round trips on the day shift at that time was 6 to 11. Tr. 374. He worked on the same shift with Claimant for approximately a year and three months. Tr. 375.

DISCUSSION

As noted above, Claimant is seeking a determination as to the extent of any permanent partial disability he sustained as a result of the injuries he suffered on September 25, 2000 while working at the Ceres Marine Terminal in Dundalk, Maryland. He argues that use of the AMA Guides is not mandated with respect to any determination regarding the extent of disability and that "the impact of the effects of the injury on the Claimant's ability to continue in his regular activities is an important aspect in the overall determination as to the nature and extent of the Claimant's permanent partial disability." Claimant's Brief ("Cl. Br.") at 11. Claimant alleges

that pain is not specifically addressed in the AMA Guides, and it was pain which "limited his ability to continue in his job with the level of activity demanded of him." *Ibid*. He further argues that Dr. Shepard's assessment of Claimant's disability, *i.e.*, 40% permanent partial disability to the left knee, 20% permanent partial disability to the right knee, and 20% permanent partial disability to the left foot, accurately measures the level of his disability and, unlike Dr. Pollak's assessment, is not based on strict adherence to the AMA Guides which measures only "impairment" and not "disability." *Id*. at 12-22. Finally, he asserts that he was "obliged to change his job so as to avoid the activities at his railhead checker job that aggravated his injuries, causing him increased pain and discomfort," and his reduction in earnings substantiates his claims with respect to the level of disability assessed by Dr. Shepard. *Id*. at 27.

Employer argues that Dr. Pollak's reliance on the AMA Guides as a basis for rating Claimant's disability was appropriate, and that his ratings fully consider all aspects of Claimant's impairment, including pain. Employer's Post-Hearing Brief ("Emp. Br.") at 46. Employer further argues that Dr. Sheppard failed to adequately explain the basis for his disability ratings, and that such ratings should be disregarded since they "are substantially based on the injury's effect on the Claimant's job, and his inability to do his job." *Id*. at 47.

As a preliminary matter, I note that any reduction in Claimant's earning capacity is, in light of the fact that his injuries pertain to permanent partial loss of use of his legs and left foot, irrelevant to evaluating the level of disability. *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268 (1980) ("*PEPCO*"). As the Court wrote in *PEPCO*, "if the injury is of a kind specifically identified in the schedule set forth in §§ 8(c)(1)-(20) of the Act, 33 U.S.C. §§ 908(c)(1)-(20), the injured employee is entitled to receive two-thirds of his average weekly wages for a specific number of weeks, regardless of whether his earning capacity has actually been impaired." *Id*. at 269; *see also Gilchrist v. Newport News Shipbuilding and Dry Dock Co*., 135 F.3d 915 (4th Cir. 1998) (ALJ may not consider economic effects of impairment in assigning disability rating).[2] Compensation with respect to Claimant's injuries to his knees and left foot is expressly governed by Section 8(c)(19) of the Act, and his reduction in wages since the time of the September 25, 2000 accident is therefore irrelevant to the issues presented herein. *Ibid*. However, the evidence presented during the hearings in this case with respect to the level and frequency of Claimant's activities as a railhead checker, and his switch from that position to the job of "clerk/checker," is being offered by Claimant solely as a basis for evaluating the level of his physical impairment since the time of the September 25, 2000 accident. Cl. Br. at 27. Such evidence is therefore relevant and will be considered in evaluating Claimant's disability ratings.

Claimant has alleged that he frequently completed as many as 32 round trips per day while working as a railhead checker, *see*, *e.g.*, Tr. 98-99, and he testified that it was this level of activity which he could no longer maintain after the September 25, 2000 accident. However, the

[2] Employer suggests, in a September 16, 2003 reply to Claimant's brief, that the *Gilchrist* decision requires disability ratings relating to scheduled members be based solely on "medical impairment" without regard to whether Claimant can perform the work of a railhead checker. While both *Gilchrist* and *PEPCO* clearly preclude consideration of a reduction in a claimant's earning capacity (i.e., "economic loss"), I do not believe either decision precludes consideration of evidence relevant to whether Claimant is capable of performing the physical activities associated with his job. *See, e.g., Mazze v.Frank J. Holleran, Inc*. 9 BRBS 1053, 1055 (1979) (may consider ability to work not as economic loss but as measure of physical injury).

evidence as a whole shows that the average number of round trips he was required to make in his job was substantially fewer than alleged by Claimant.

According to Mark Dennis' June 28, 2001 job analysis report, Don Cook, Ceres' superintendent at the terminal railhead where Claimant was employed, said a slow day for a checker required about 10 round trips, an average day required about 20 round trips, and a busy day required about 30 round trips. CX 11 at 70. Dennis testified that the day he observed Claimant performing his job, it took approximately 20 to 30 minutes to find the 10 or so containers typically shown on his list before he could then return to the office, and it then took 5 or 10 minutes for Claimant to do whatever he needed to do in the office before going back out on the next trip. Tr. 200-02. Dennis further testified that he observed Claimant making 30 round trips that day, although his report does not document that observation. Indeed, a "log" Claimant testified he maintained from May 16, 2001 to June 29, 2001 shows he completed only 25 round trips on June 28, 2001, the day Dennis testified he observed Claimant making 30 round trips. CX 12. Accepting the figures reported to Dennis by Cook at face value, Claimant's average day involved only 20, rather than 30+, round trips. Other evidence of record suggests the average was closer to 15 round trips.

John Cook, like Mark Dennis, testified that each trip lasted approximately 20 to 30 minutes, but he put the average number of trips to the yard and back at around 12. Tr. 141-47. Joseph Butta, Claimant's own witness, also testified that an average trip out and back took approximately 20 to 25 minutes, although he claimed the number of round trips per shift ranged from 24 to 36. Tr. 135-39. Frank Acton testified that he made approximately 6 to 8 round trips while working the day shift as a railhead checker and it took between 20 and 30 minutes for each trip depending on how many containers were on the checker's list. Tr. 367-70. Although he acknowledged that it could take as little as 5 or 10 minutes to complete a round trip if the checker were only looking for one or two containers, he further testified that it would be a waste of everyone's time if checkers routinely went out to locate that number of containers each time. Tr. 372-73.

Assuming an average of 5 to 10 minutes at the office between trips, an 8 hour shift would allow for no more than about 16 trips lasting between 20 and 25 minutes even without taking into consideration time off for a lunch break. Furthermore, Claimant gave no reason why he would have to make more frequent trips to locate only one or two containers, and the day Dennis observed him work, Claimant's lists of containers typically had between 10 and 20 containers listed on them. Tr. 200. Based on the foregoing, I find that Claimant's testimony with respect to the physical demands of his job as a railhead checker is not supported by the record.

I further find that Claimant's testimony regarding his inability to continue performing his checker job as a result of the September 25, 2000 injuries is not credible and thus cannot support his claim for the higher disability ratings he is seeking. Claimant's own treating physician, Dr. Shepard, testified that Claimant would be able to perform his job as a railhead checker if it took approximately 20 to 30 minutes to locate containers on each trip and Claimant thereafter waited between 5 and 10 minutes in his office before going out on his next trip. Tr. 279. That level of activity is, as noted above, consistent with the evidence of record. Furthermore, Dr. Pollak attributed any difficulty Claimant was experiencing going up and down steps to the pain caused

by his hip arthritis, not his knee or foot conditions. Tr. 330, 337. Based on their examinations of Claimant, both Dr. Pollak and Dr. Riederman determined that Claimant was fully capable of performing the duties of a checker. EX 46, 52, 54, 64, 65.

With respect to the issue of what ratings are appropriate for his disabilities, I agree with Claimant that the LHWCA does not "mandate" the use of the AMA Guides in determining the nature and extent of disability of a scheduled member. Cl. Br. at 9. *See also*, *Ortega v. Bethlehem Steel Corp*., 7 BRBS 639, 642 (1978) (adherence to AMA Guides not required in rating impairment of scheduled member). However, it is quite clear that a physician's reliance on the AMA Guides in support of his assessment of the level of impairment resulting from a work-related injury is entirely appropriate, and an ALJ's finding with respect to the level of disability is adequately supported by a physician's opinion based on the AMA Guides. *See, e.g., Jones v. I.TO. Corp*., 9 BRBS 583, 585 (1979) (AMA Guides properly used by ALJ as an "interpretive guide" and is a "standard reference used by physicians in testimony before [ALJs]"). As explained below, I find Dr. Pollak's opinion with respect to Claimant's leg and foot impairments, which is based on a thorough review of the medical evidence, three examinations of Claimant, and consideration of the AMA Guides, more accurately reflects the level of Claimant's disabilities than the opinion of Dr. Shepard.

In the instant case, Dr. Pollak fully documented, and supported through his hearing testimony, the rationale for his ratings with respect to the level of impairment suffered by Claimant as a result of his September 25, 2000 accident. He examined Claimant on three separate occasions, thoroughly reviewed his medical records, including various reports of objective tests, and reviewed both the Fourth and Fifth Editions of the AMA Guides in assessing his disabilities. He also reviewed both of the job analysis reports and videotapes prepared by Mark Dennis and opined that Claimant was fully capable of performing, without restrictions or accommodations, the duties of a railhead checker as demonstrated in either scenario. He explained that the AMA Guides allow for the assessment of impairments of the lower extremities based on anatomic changes, diagnostic categories, and functional changes. EX 54 at 6-8, EX 63 at 525-27. The AMA Guides expressly take into account "an individual's ability to perform the activities of daily living (ADL)." EX 63 at 523. Dr. Pollak determined that a 6% rating of the left knee was appropriate based on a diagnosis of prior subtotal lateral meniscectomy, explaining that the AMA Guides' allowance of a 2% rating for a "partial" meniscectomy was inadequate and Claimant's subtotal meniscectomy more closely approximated a "total" meniscectomy for which a 7% rating would be assigned. Radiographic evidence with respect to the knees showed normal cartilage intervals and would not warrant an impairment rating based on the presence of arthritis. Tr. 335-36. He also found no anatomic changes present with respect to Claimant's knees, such as limb length discrepancy, muscle atrophy, ankylosis, amputation, skin loss, peripheral nerve injury, vascular injury, or causalgia, which might warrant an impairment rating. Nor did he find any evidence of reduced range of motion, gait derangement, or diminished muscle strength which would allow an impairment rating based on functional changes. Claimant's chondromalacia of the left knee, and torn meniscus in the right knee, were insufficiently severe to warrant a rating. Tr. 327, 349, 364. With respect to the left foot, he found no impairment resulting from Claimant's injury based on the absence of any reduced range of motion, ankylosis, or amputation. He concluded that the mid-foot contusion and metatarsal fracture resulting from Claimant's September 25, 2000 injury had fully resolved, and that any

swelling in Claimant's left foot was the result of mid- and hind-foot arthritis which was neither caused, nor aggravated, by Claimant's September 25, 2002 injury. Tr. 312, 314, 331-334, 341-42, 354, 365. He further noted that the impairment ratings in the AMA Guides generally include consideration of pain, Tr. 322-23, and he intentionally did not increase Claimant's impairment rating for pain since he believed that most of the pain limiting Claimant's activities was related to his right hip arthritis. Tr. 329-330, 357.

In contrast to the opinion of Dr. Pollak, Dr. Shepard has opined that Claimant's September 25, 2000 injuries caused a 40% impairment of his left knee, a 25% (subsequently changed to 20%) impairment of his right knee, and a 20% impairment of his left foot. CX 1 at 34. In the October 4, 2001 addendum to his June 29, 2001 examination report, in which he first rated Claimant's disabilities, he stated that he utilized the Fourth Edition of the AMA Guides "taking into account subjective findings such as pain, weakness, loss of endurance, capacity to carry out activities of daily living, work and recreational activities in a facility without discomfort . . . ." *Ibid*. When he examined Claimant on November 16, 2001, approximately three weeks after writing this evaluation, he recorded various complaints and findings with respect to Claimant's back and hip but made no findings with respect to his knees or left foot. CX 1 at 36. When he examined Claimant on November 22, 2002, approximately one year later, he "reiterated and sustained" his earlier ratings after reviewing Dr. Pollak's September 20, 2002 IME report (erroneously noted by Dr. Shepard as 9/25/02 report), although he changed, without explanation, his rating for the right knee from 25% to 20%. CX 1 at 38. He testified at the hearing that the AMA Guides, which rate impairment rather than disability, "doesn't account for pain, weakness, his ability to carry out activities of daily living, his job . . . ." Tr. 225. In explaining his 40% rating of the left knee, he testified: 2% is allowed by the AMA guides for a partial meniscectomy, to which he would add 8% for Claimant's grade 3 medial femoral chondral defect "which is going to doom this man down the road in some form or fashion, [for which] you've got to give him credit." (Tr. 242); he would add another 15% if Claimant worked at a desk job (Tr. 249); and, based on the fact that Claimant worked as a railhead checker, he added another 15% (Tr. 249-50) resulting in a total of 40% (i.e., 2% + 8% + 15% + 15% = 40%). With respect to his rating of the right knee, Dr. Shepard testified that, although application of the AMA Guides would result in a zero disability rating, his original 25% and later 20% ratings of the right knee were based on Claimant's symptoms, an MRI finding of a lateral meniscus tear which did not warrant surgery, and other unspecified "examination findings." Tr. 261-62. Finally, he testified that a 20% rating for Claimant's left foot was justified by a 14% rating under the AMA Guides for "fairly significant narrowing" of the joint space, which he did not document, and 6% based on "all the other factors." Tr. 263, 265. He also testified that reduced range of motion noted in Claimant's left ankle at the time of his November 22, 2002 examination would justify a 22% rating for the left foot under the AMA Guide. Tr. 297.

I find Dr. Shepard's explanations of his ratings for Claimant's bilateral knee and left foot conditions poorly reasoned and inconsistent with the weight of the medical evidence, including the better reasoned opinions of Dr. Pollak. For example, Dr. Shepard expressly acknowledged that Claimant was capable of performing his duties as a railhead checker if, as I determined above, Claimant spent approximately 20 to 30 minutes to locate containers on each trip and he spent between 5 and 10 minutes in the office between trips, Tr. 279, yet he increased his disability ratings because of Claimant's inability to do that job. He gave no rational explanation

for adding 15% to Claimant's left knee rating "if he worked at a desk job," or for then adding an additional 15% to that rating simply because he worked as a railhead checker. His rating for Claimant's right knee changed from 25% to 20% without explanation, and his justification for the 20% rating for Claimant's left foot, given for the first time at the April 2003 hearing, was based either on "fairly significant narrowing" of the joint space shown on x-ray, which he acknowledged he never documented, and/or a reduction in the range of ankle motion which, according to Dr. Pollak, was not measured in accordance with generally accepted medical practices. Tr. 308, 310. These and other deficiencies in Dr. Sheppard's opinion substantially diminish its probative value.

For all the foregoing reasons, I find that Claimant has, as a result of his September 25, 2000 injuries, sustained a 6% permanent partial disability of the left leg.

In 1978 and 1980, Claimant was awarded disability compensation under the Act of 7% and 2 ¾%, respectively, for permanent partial loss of use of his left leg. Tr. 8-9, CX 9, 10. The parties have stipulated, and I find, that Employer is thus entitled to a credit in this case of $6,742.70 for compensation previously paid in connection with those awards.

ORDER

IT IS HEREBY ORDERED that:

A. Employer Ceres Marine Terminals shall pay Claimant Augustine Mack, Jr. compensation under the Act for 6% permanent partial disability of the left leg from the date he reached maximum medical improvement on June 29, 2001.

B. Employer Ceres Marine Terminals shall receive a credit of $6,742.70 previously paid to Claimant with respect to his left leg disability.

C. The district director shall perform all calculations necessary to effect this order.

A

STEPHEN L. PURCELL
Administrative Law Judge

Washington, D.C.